STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2003
v	No. 239352 Wayne Circuit Court
LAWRENCE F. HEGWOOD, Defendant-Appellant.	LC No. 01-002337-01

Before: Talbot, P.J. and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a, and unarmed robbery, MCL 750.530. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to twenty to forty years in prison for the home invasion conviction, and five to fifteen years in prison for the robbery conviction. We affirm.

I. Basic Facts

On a February evening, seventy-year-old Norma Franklin was asleep when she heard a loud bang at her front door. A man with a black mask and gloves jumped through Franklin's porch door into the living room, threatening to kill Franklin. The man told Franklin that he wanted some money, grabbed Franklin by the arm, and threw her onto the floor. Franklin gave the man what money she found. The man took the money, a diamond wedding ring that Franklin was wearing, and Franklin's purse.

Detroit police officers, responding to a neighbor's call, entered Franklin's front door. When the intruder saw the police, he ran toward the bathroom and jumped out the window. Several witnesses identified defendant as the man who jumped out of Franklin's bathroom window. Franklin observed the police officers bring a man from the back of her house and put him in a police car. The man police had in custody was not wearing a mask, but he was wearing the same clothes as the intruder. Because Franklin saw the man's face when the police brought him around, she was able to identify him in court. The police retrieved Franklin's money and a pair of black leather gloves from defendant. They also found a black ski mask and Franklin's purse in the bathroom.

II. Prior Conviction

Defendant first argues the trial court erred in allowing the admission of defendant's prior conviction of breaking and entering.[1] He asserts (1) that his prior conviction does not contain an element of theft and (2) the trial court failed to properly weigh the probative value against the prejudicial effect of the evidence. We disagree.

Generally, we review the admission of prior convictions for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

A witness's credibility may be impeached with prior convictions, MCL 600.2159, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). Evidence of a prior conviction may be admissible for impeachment purposes either automatically, in the case of an offense involving dishonesty or a false statement, or after a balancing test, in the case of an offense involving theft. MRE 609; *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997). In explaining the balancing test, the Michigan Supreme Court in *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988), stated:

> In sum, the trial judge's first task, under the amended MRE 609, will be to determine whether the crime contains elements of dishonesty or false statement. If so, it would be admitted without further consideration. If not, then the judge must determine whether the crime contains an element of theft. If it is not a theft crime, then it is to be excluded from evidence without further consideration. If it is a theft crime and it is punishable by more than one year's imprisonment, the trial judge would exercise his discretion in determining the admissibility of the evidence by examining the degree of probativeness and prejudice inherent in the admission of the prior conviction.

Contrary to defendant's contention, the record reveals that pursuant to MRE 609, the trial court determined that defendant's prior conviction for breaking and entering contained an element of theft. The court then properly weighed the probative value against the prejudicial effect inherent in he admission of the conviction. We also note that the court not only gave the jury a limiting instruction immediately following admission of the evidence, but again at the conclusion of the case. Therefore, we find the trial court did not abuse its discretion in admitting the prior conviction for impeachment purposes only.[2]

III. Double Jeopardy

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[1] Breaking and entering is the predecessor offense to home invasion.

[2] Even if the prior conviction should have been excluded, admission would not have undermined the reliability of the verdict. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The prosecution introduced overwhelming evidence of defendant's guilt.

Next, defendant contends that his convictions for first-degree home invasion and unarmed robbery violate the prohibition against double jeopardy because the two offenses were based on the single act of taking Franklin's purse. Defendant further contends that the Legislature did not intend multiple punishments for defendant's alleged actions because the statutes punish the same behavior. Although defendant did not raise the issue before the trial court, a double jeopardy issue presents a significant constitutional question that this Court will nonetheless review de novo. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). These guarantees protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *Herron, supra* at 599. The Legislature's intent constitutes the determining factor under both the federal and Michigan Double Jeopardy Clauses. *People v Dillard*, 246 Mich App 163, 165; 631 NW2d 755 (2001). Thus, we must consider "whether there is a clear indication of legislative intent to impose multiple punishment for the same offense." *Id.*, quoting *People v Mitchell*, 456 Mich 693, 696; 575 NW2d 283 (1998). Applying the traditional rules of statutory construction, if a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether the statutes proscribe the "same" conduct, our task is complete. *Id.* at 246, quoting *Mitchell*, quoting *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 535 (1983).

The first-degree home invasion statute, MCL 750.110a, provides, in relevant part:

> (2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

The unarmed robbery statute, MCL 750.530, provides:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than fifteen [15] years.

The offense of home invasion was complete upon defendant's breaking and entering Franklin's home with the intent to rob her, whereas the subsequent unarmed robbery offense (i.e., taking Franklin's money, purse and ring), committed once inside Franklin's house, constituted a separate act. See *People v Patterson*, 212 Mich App 393, 395; 538 NW2d 29

(1995). Thus, each of these offenses requires proof of at least one fact that the other does not. Additionally, the home invasion statute provides multiple punishments for both first-degree home invasion and any other felony committed after entry. See MCL 750.110a(8)(9).[3] Furthermore, each statute prohibits conduct violative of a social norm distinct from the norm protected by the other. *Dillard, supra.* Therefore, defendant's convictions and punishments under both statutes do not violate the constitutional prohibition against double jeopardy.

IV. Prosecutorial Misconduct

Defendant also argues that the prosecutor engaged in prosecutorial misconduct when she asked defendant to comment on whether he (defendant) believed that prosecution witnesses were lying when they gave sworn testimony regarding the case. This Court reviews claims of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, because defendant failed to object to the prosecutor's conduct, we will only review defendant's claims of prosecutorial misconduct for plain error. *Id.* In order to avoid forfeiture of an unpreserved claim, a defendant must demonstrate a plain error that was outcome determinative. *Id.*

It is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses because a defendant's opinion on such a matter is not probative, and credibility determinations are to be made by the trier of fact; however, such an error does not necessarily warrant reversal. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). In this case, after defendant's testimony presented a version of the incident that was completely different from the version described by the prosecution's witnesses, the prosecutor asked defendant if he thought the other witnesses were lying. Like the defendant in *Buckey*, defendant "dealt rather well with the questions." *Buckey*, *supra* at 17. Additionally, the prosecutor's questioning in this regard was brief. Therefore, any error in this respect was not outcome determinative.

V. Ineffective Assistance of Counsel

Defendant also contends that he was denied the effective assistance of counsel. Failure to move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), usually forecloses appellate review unless the appellate record contains sufficient detail to support a defendant's claims. If so, review is limited to the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). In this case, there is no indication that defendant filed a motion for a *Ginther* hearing or a new trial. As a result, our review is limited to errors apparent on the record. For a defendant to establish that he was denied the effective assistance of counsel, he must show that his attorney's representation fell below an objective

[3]MCL 750.110a(8) provides: "The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.110a(9) provides: "Imposition of a penalty under this section does not bar imposition of a penalty under any other applicable law."

standard of reasonableness and that this was so prejudicial that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that defense counsel's actions constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303.

A. Improper Questioning

With respect to the prosecutorial misconduct discussed *supra*, defendant contends that he was denied the effective assistance of counsel because his attorney failed to object to the prosecutor's cross-examination of defendant. Because any error with respect to the prosecutor's questions was not outcome determinative, defense counsel's failure to object to these questions was also not outcome determinative. Therefore, we find defendant was not denied the effective assistance of counsel on this basis.

B. Juror Challenges

Defendant also argues that he was denied the effective assistance of counsel because defense counsel failed to request that juror number eleven be removed from the jury based on her admission that she was not sure she could be impartial. Additionally, although not clearly argued, it appears that defendant also contends that defense counsel was ineffective for failure to challenge for cause (1) potential juror number nine who had socialized with the prosecutor on various occasions, and (2) potential juror number thirteen, an ex-police officer who had previously worked with the officer in charge, was not removed for cause. We disagree.

Counsel's decision relating to the selection of jurors is generally a matter of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). A review of the record reveals that juror number eleven stated unequivocally that she was open-minded. There was no basis for counsel to have challenged this juror for cause. Although defense counsel did not challenge juror number nine for cause, defense counsel exercised a peremptory challenge to excuse that juror. Because juror number nine did not serve on defendant's jury, defendant cannot demonstrate prejudice. We also reject defendant's argument that defense counsel was ineffective in failing to challenge juror number thirteen for cause. Defense counsel did challenge this juror for cause, arguing that the potential juror knew the investigating officer and worked for the police department. The court, noting that juror number thirteen indicated his ability to keep an open mind, denied the challenge. Subsequently, defense counsel exercised a peremptory challenge to have juror number thirteen removed. Because defendant has failed to show prejudice and failed to overcome the presumption that defense counsel's method of jury selection was sound trial strategy, we find that defendant was not denied effective assistance of counsel in this regard.

VI. Jury's Request to Review Testimony

Next, defendant argues that the trial court denied him his right to a fair trial when it denied the jury's request to review the witness testimony. Generally, this Court reviews the trial

court's decision whether to grant the jury's request to review certain testimony for an abuse of discretion. MCR 6.414(H); *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). However, because defendant did not object to the trial court's response, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCR 6.414(H) provides in relevant part:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Because the trial court, in ordering the jury to deliberate using its collective memory of the testimony, indicated that it was not foreclosing the possibility of having the testimony reviewed at a later time, the court's instruction fell within the discretion granted courts by MCR 6.414(H). Defendant's constitutional rights were adequately protected, and defendant has failed to demonstrate plain error affecting his substantial rights.

VII. Sentencing

Finally, Defendant contends the trial court abused its discretion and violated the principle of proportionality when sentencing defendant. When a sentence is imposed within the legislative guidelines recommended minimum range, appellate relief is limited. MCL 769.34(10); *People v Hegwood*, 465 Mich 432, 439-440; 636 NW2d 127 (2001).[4] MCL 769.34(10) provides, in relevant part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant's minimum sentence of twenty years (240 months) falls within the applicable guidelines minimum sentence range of 84 to 280 months. Defendant does not argue that the trial court erred in its scoring of the guidelines or relied on inaccurate information in sentencing defendant. Therefore, we are required to affirm defendant's sentence. MCL 769.34(10)*; People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

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[4] The legislative sentence guidelines apply to the instant case because the offenses were committed after January 1, 1999. MCL 769.34(1), (2); *Hegwood, supra* at 436.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly